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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 396

CALIFORNIA CITIZENS BAND ASSOCIATION, INCORPORATED, a corporation,
Petitioner,

vs.

THE UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

CLOSING BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

REBUTTAL ARGUMENT

1. INTENT AND PURPOSE OF THE CITIZENS RADIO SERVICE

Petitioner wishes to correct an allegation made in respondent's brief in connection with the purpose of the Citizens Radio Service. Respondent states as a fact on page 4 of its brief: "They also violated the

basic nature of the service-communication between units of the same station rather than between different stations. 29 Fed Reg 11101." It is true that this policy was enunciated in 1964 by respondent Commission in 29 Fed Reg 11101, but that had not been its earlier intention as shown in 13 Fed Reg 4796 of August 19, 1948 wherein the definition of Citizens Radio Service was given as follows:

> "A fixed and mobile service intended for use for private or personal radio communication, radio signalling, control of objects or devices by radio, and other purposes not specifically prohibited herein. Any citizen of the United States eighteen years of age or over is eligible to be licensed in this service. . . . Each station in the Citizens Radio Service is authorized to communicate with other stations in this service."

Nothing was said about the alleged basic purpose being the communication between units of the same licensee. This idea was an afterthought brought in many years later after thousands of citizens had secured licenses and had purchased many millions of dollars of equipment to operate on the Citizens Class D Band.

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2. IS THE PROTECTION AFFORDED BY THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION ONLY AVAILABLE IN RESPECT TO "SUBSTANTIAL" VIOLATIONS OF CONSTITUTIONAL RIGHTS?

Respondent in its brief on page 6 thereof adopts and admits the view of the court of appeal that there was "a relatively minor adjustment" in the licensees' freedom to operate in that transmission time was

shortened and frequencies reduced from 23 to 7 in inter-station communication. 47 U.S.C. 316 provides that a license modification may be effected only after a public hearing unless the licensee acquiesces in the modification. Here petitioner certainly did not acquiesce in the modification but on the contrary demanded a hearing. The commission and the court of appeal did not think the encroachment was sufficient to necessitate a hearing. Petitioner feels otherwise. If an administrative agency has the right to determine what amount of encroachment on constitutional rights is necessary before due process of law is afforded, then we have a government of men and not of law. Due process of law requires that *all* encroachments be protected against. Our founding fathers were extremely vehement in their insistence that *all* rights afforded to the people by the Constitution must be safeguarded. Alexander Hamilton, in writing *The Federalist,* No. 78, on page 492, *The Belknap Press of Harvard University Press,* 1961, states on this subject:

> "There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid."

3. CONCLUSION

It is respectfully submitted that the "Whittling" away of constitutional rights by governmental agencies on the ground that the encroachment is not substantial enough to warrant the application of constitutional safeguards is void under the "Due Process" clause of the Fifth Amendment and should be stopped. Petitioner requests that this honorable court grant its petition for a writ of certiorari in the above entitled cause.

Dated, Oakland, California,
September 19, 1967.

Respectfully submitted,
CLIFTON HILDEBRAND,
Attorney for Petitioner.

DONALD M. SEA,
Of Counsel.

CERTIORARI DENIED